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SUPREME COURT, U. S.

No. 74-1575

In the

Supreme Court of the United States

OCTOBER TERM, 1974

Richardson Independent School District,

Petitioner

v.

United States of America,

Respondent

# BRIEF OF AMICUS CURIAE

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BRIEF OF AMICUS CURIAE

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes Clifford E. Abrams and respectfully requests the Court to consider this brief of Amicus Curiae:

I. EQUITABLE POWERS OF COURTS AND THE RIGHT TO TRAVEL

The issue presented here is whether the broad equitable powers of district courts in school desegregation cases include the power to assign students to schools that are not nearest their homes or if such assignments violate the fundamental right to travel.

The Supreme Court has made it clear that the

right to travel has long been recognized as a basic right under the Constitution, or a "fundamental right"[1].

Implicit in the right to travel is the right not to travel.

Some of the effects of assigning students to distant schools, bypassing the schools in close proximity, are:

1. endangering their persons unnecessarily by exposing them to the dangers inherent in travel on the public roads;

2. increasing the amount of time necessary for students and/or their parents to travel, thereby interfering with or depriving them of some of their freedom;

3. interfering with the educational process by

1. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumenstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941); Kent v. Dulles, 357 U.S. 116 (1958); and Oregon v. Mitchell, 400 U.S. 112 (1969).

increasing the amount of time and energy that must be devoted to the non-educational pursuit of travel; and

4. in some instances effectively nullifying a basic reason for the choice of location of residence, that of proximity to schools.

II. ORIGIN OF THE RIGHT TO TRAVEL.

Mr. Justice Harlan, in his concurring opinion in Guest, cited the case of Corfield v. Coryess, 4 Wash CC 371 (1825) in which the court stated that the right to travel was a fundamental right. The fact that Corfield was decided forty-three years before the adoption of the Fourteenth Amendment negates any proposition that the right to travel arises under and is dependent upon the Fourteenth Amendment, which strengthened the right but cannot be said to have created it. Mr. Justice Harlan also noted that the right to travel was expressly stated in the Articles of Confederation. This, then, leads to the Ninth Amendment,

which states:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people",

and to the conclusion that the right to travel, limited only by express or implied provisions of the Constitution, was retained by the people and not delegated to the United States; and to the further conclusion that the right was reserved "to the people" by the Tenth Amendment.

This right, then, cannot be denied or disparaged by a State or any subdivision thereof, or by the Federal Government or any branch therof, but only by the people by Constitutional amendment.

## III. STUDENT SCHOOL ASSIGNMENTS AND THE FOURTEENTH AMENDMENT

The question presented is whether or not the assignment of students to schools not nearest their homes deprives the students and their parents of equal protection under the laws.

The Supreme Court, in Swann v. Charlotte Mecklenberg Board of Education, 402 U.S. 1, 17,

interpreted the Civil Rights Act of 1964, 42 U.S.C. Section 2000c, as being

> "designed to foreclose any interpretation of the Act as expanding the existing powers of federal courts to enforce the Equal Protection Clause."

The Court went on to say that

> "The basis of our decision must be the prohibition of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws."

Such assignments have been made, as in Swann and other cases, by allocating students to specified schools on the basis of race. This denies equal protection under the laws by discrimination on the basis of race, since but for their race they would not be so assigned.

IV. BROWN AND SWANN DISTINGUISHED

In Brown I, 347 U.S. 483, one of the questions propounded by the Court (Footnote 13, at 495) was:

> "(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to the schools of their choice . . ."

In Brown II, 349 U.S. 294, the above question

was repeated (Footnote 1, at 298) and the Court also stated (at 300) that

> ". . .the courts may consider . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis . . .".

In Swann (at 30) the Court recited that the transportation plan previously operated by the State as a means of achieving segregation exceeded the transportation plan adopted by the District Court in both time and distance, and stated:

> "In these circumstances" (emphasis supplied), "we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation."

The District Court's plan therefore decreased the amount of danger inherent in travel on an average basis, but perhaps not on an individual basis. The best means to promote the general welfare of the students is to assign them to schools nearest their homes.

V. BROWN REVIEWED

In Brown, the Supreme Court was confronted

with the complaints of minor children who were refused admittance to their neighborhood schools on the basis of race. This was the State action prohibited by the decision in Brown. Treating "transportation" as being synonymous with "desegregation" comes full circle and arrives at the same results complained of by the minor children in Brown.

VI. PUNITIVE POWERS APPLIED TO STATES

No authority has been found, prior to school desegregation cases, for the proposition that a district court's remedial powers include or give rise to punitive powers when a State has failed to comply with the Equal Protection Clause.

The assignment of students to distant schools, thereby requiring transportation, punishes the State and its taxpayers as effectively as a monetary fine by requiring the expenditure of funds for non-educational purposes and, in itself, thereby impedes educational processes.

The greatest burden of punishment is imposed

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on those who have not been shown to be at fault, the students and their parents.

VII. AVAILABLE REMEDIES

The courts have ample powers to prohibit any State action supporting segregation by:

1. requiring optional majority-to-minority transfer plans;

2. prohibiting gerrymandering of attendance zone boundaries;

3. prohibiting unfair allocations of faculty, staff, extracurricular activities and facilities;

4. prohibiting school construction and abandonment as tools to perpetuate or re-establish dual school systems;

5. enforcing the open housing laws in proper cases; and

6. enforcing the equal opportunity laws in proper cases.

It is submitted that these powers are ample, in themselves, to prohibit non-compliance with the Equal Protection Clause of the Fourteenth

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Amendment without infringing on the fundamental right to travel.

WHEREFORE, it is prayed that this Court grant Petitioner's Petition for Writ of Certiorari; order that assignments of students to non-neighborhood schools is unconstitutional; or, in the alternative, clarify the ruling in Swann and restrict such assignments to similar fact situations.

Respectfully submitted,

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